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ATTORNEYS FOR PLAINTIFFS

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Case No.: _____

**CLASS ACTION
COMPLAINT FOR DAMAGES,
RESTITUTION AND INJUNCTIVE
RELIEF**

Jennifer Mead, individually, on behalf of
all others similarly situated, and on behalf
of the general public

Plaintiff,

v.

Advantage Sales & Marketing, LLC,
Advantage Sales & Marketing, Inc., and
Retail Store Services, LLC,

Defendants.

- (1) **Violations of Fair Labor Standards Act, 29 U.S.C. Section 201, et seq.**
- (2) **Overtime Violations (California Labor Code Sections 510, 1194 and 1198, and IWC Wage Order(s))**
- (3) **Waiting Time Penalties (California Labor Code Sections 201-203)**
- (4) **Failure to Provide Itemized Wage Statements (California Labor Code Section 226)**
- (5) **Violation of California Business and Professions Code Sections 17200 et seq.**

DEMAND FOR JURY TRIAL

PRELIMINARY STATEMENT

1. This is a collective and class action brought by Individual and Representative Plaintiff Jennifer Mead on her own behalf and on behalf of the proposed class identified below (“Plaintiffs”). Plaintiffs were or are employed by Defendants Advantage Sales & Marketing, LLC, Advantage Sales & Marketing, Inc. and Retail Store Services, LLC. Plaintiffs were or are employed as “Merchandising Representatives,” “Merchandising Sales Representatives” or some similar title, and were required to, among other things, receive and display marketing and promotional materials for various products sold at stores like Home Depot. Plaintiffs were either misclassified as exempt and therefore erroneously denied overtime, or not paid for all of the time they suffered or permitted to work for Defendants and therefore erroneously denied overtime compensation as required by state and federal wage and hour laws. These employees are similarly situated under Federal Rule of Civil Procedure 23 (“Rule 23”) and the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b).

2. The Collective Class (FLSA) is made of all persons who are or have been employed by Defendants with the job title of “Merchandising Representative,” “Merchandising Sales Representatives” or some similar title, who were either misclassified as exempt, and therefore erroneously denied overtime compensation as required by federal wage and hour laws, or not paid for all time they suffered or permitted to work for Defendants and therefore erroneously denied overtime compensation as required by federal wage and hour laws, at any time within the United States within three years prior to this action’s filing date through the date of final disposition of this action (the “Collective Class Period”).

3. The Class (Rule 23) is made up of persons who are or have been employed by Defendants with the job title of “Merchandising Representative,” “Marketing Sales Representatives” or some similar title, who were either misclassified as exempt, and therefore erroneously denied overtime, or not paid for all time they suffered or permitted to work for Defendants and therefore erroneously denied overtime compensation as required by state wage and hour laws, within the State of California within the period four years prior to the filing date of this Complaint (“the Class Period”).

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 as this case is being brought under the FLSA, 29 U.S.C. § 207 *et seq.* The representative Plaintiff has signed a consent form to join this lawsuit, a copy of which is attached as **Exhibit A**. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

10. Venue is proper in the United States District Court, Northern District of California pursuant to 28 U.S.C. § 1391, because Defendants conduct business in such District, and because a substantial part of the events giving rise to the claims occurred in this District.

11. Pursuant to Civil L.R. 3-2(c) and (d), this action is properly assigned to the Northern District of California because a substantial portion of the events giving rise to this dispute occurred in such District.

COLLECTIVE ACTION ALLEGATIONS

12. Plaintiff Mead brings this action on behalf of herself and other similarly situated employees as authorized under FLSA § 16(b), 29 U.S.C. § 216(b). The employees similarly situated are:

Collective Class: All persons who are or have been employed by Defendants with the job title of “Merchandising Representative,” “Merchandising Sales Representative” or some similar title, who were either misclassified as exempt, and therefore erroneously denied overtime compensation as required by federal wage and hour laws, or not paid for all time they suffered or permitted to work for Defendants and therefore erroneously denied overtime compensation as required by federal wage and hour laws, at any time within the United States within three years prior to this action’s filing date through the date of final disposition of this action.

13. Upon information and belief, Defendants suffered and permitted Plaintiff Mead and the Collective Class to work more than forty hours per week without overtime compensation.

14. Defendants’ unlawful conduct has been widespread, repeated and consistent.

1 15. Upon information and belief, Defendants knew that Plaintiff Mead and the
2 Collective Class performed work that required overtime pay.

3 16. Defendants' conduct, as set forth in this Complaint, was willful and in bad faith,
4 and has caused significant damages to Plaintiff Mead and the Collective Class.

5 17. Defendants are liable under the FLSA for failing to properly compensate Plaintiff
6 Mead and the Collective Class, and as such, notice should be sent to the Collective Class. There
7 are numerous similarly situated current and former employees of Defendants who have been
8 denied overtime pay in violation of the FLSA who would benefit from the issuance of a Court
9 supervised notice of the present lawsuit and the opportunity to join in the present lawsuit. Upon
10 information and belief, those similarly situated employees are known to Defendants and are
11 readily identifiable through Defendants' records.

12 **CLASS ACTION ALLEGATIONS**

13 18. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal
14 Rules of Civil Procedure 23 on behalf of the following defined class:

15 **Proposed Class:** All persons who are or have been employed by Defendants with the job
16 title of "Merchandising Representative," "Merchandising Sales
17 Representative" or some similar title, who were either misclassified as
18 exempt, and therefore erroneously denied overtime compensation, or not
19 paid for all time they suffered or permitted to work for Defendants and
20 therefore erroneously denied overtime compensation as required by state
21 wage and hour laws, within the State of California within the period four
22 years prior to the filing date of this Complaint.

23 19. Numerosity: The Proposed Class is so numerous that joinder of all members is
24 impracticable. Plaintiff Mead is informed and believes, and on that basis alleges, that during the
25 relevant time period, Defendants employed at least 75 people who satisfy the definition of the
26 Proposed Class.

27 20. Typicality: Plaintiff Mead's claims are typical of the members of the Proposed
28 Class. Plaintiff Mead is informed and believes that, during the Class Period, like other

1 merchandising representatives who were misclassified as exempt, or simply not paid for all the
2 time they suffered or permitted work to Defendants, she routinely worked more than eight hours
3 per day and more than 40 hours per week. Plaintiff Mead had the same duties and responsibilities
4 as other Class members. Plaintiff Mead was subject to Defendants' policies and practices of
5 improperly treating and classifying employees in these positions as "exempt" from state wage and
6 hour laws, failing to pay appropriate overtime compensation, and failing to maintain accurate
7 time records of hours worked by the Proposed Class or to issue accurate itemized wage
8 statements to these individuals.

9 21. Superiority: A class action is superior to other available methods for the fair and
10 efficient adjudication of the controversy, particularly in the context of wage and hour litigation
11 where individual plaintiffs lack the financial resources to vigorously prosecute separate lawsuits
12 in federal court against large corporate defendants. Prosecuting a host of identical, individual
13 lawsuits nationwide does not promote judicial efficiency or equity and consistency in judicial
14 results.

15 22. Adequacy: Plaintiff will fairly and adequately protect the interests of the
16 Proposed Class, and she has retained counsel experienced in complex, nationwide wage and hour
17 class and collective action litigation.

18 23. Commonality: Common questions of law and fact exist to all members of the
19 Proposed Class and predominate over any questions solely affecting individual members of the
20 Proposed Class, including but not limited to:

- 21 A. Whether Defendants improperly classified the members of the Proposed
22 Class as exempt;
- 23 B. Whether Defendants unlawfully failed to pay appropriate overtime
24 compensation to members of the Proposed Class in violation of the state
25 wage laws;
- 26 C. Whether Defendants employed Plaintiff Mead and the Proposed Class within
27 the meaning of the applicable state laws;
- 28 D. Whether Plaintiff Mead and the Proposed Class' members who are no longer

1 employed with Defendants are entitled to waiting time penalties pursuant to
2 the applicable state laws;

3 E. Whether Defendants failed to keep accurate time records for all hours
4 worked by Plaintiff Mead and the Proposed Class in violation of state wage
5 laws;

6 F. Whether Defendants provided adequate itemized wage statements to Plaintiff
7 Mead and the Proposed Class pursuant to state wage laws;

8 G. The proper measure of damages sustained by the Proposed Class; and

9 H. Whether Defendants' actions were "willful."

10 24. This case is maintainable as a class action under Fed. R. Civ. P. 23(b)(1) because
11 prosecution of actions by or against individual members of the class would result in inconsistent
12 or varying adjudications and create the risk of incompatible standards of conduct for Defendants.
13 Further, adjudication of each individual member's claim as a separate action would be dispositive
14 of the interest of other individuals not party to this action, impeding their ability to protect their
15 interests.

16 25. Class certification is also appropriate under Fed. R. Civ. P. 23(b)(3) because
17 questions of law and fact common to the Proposed Class predominate over any questions
18 affecting only individual members of the Proposed Class, and because a class action is superior to
19 other available methods for the fair and efficient adjudication of this litigation. Defendants'
20 common and uniform policies and practices denied the Proposed Class the overtime pay to which
21 they are entitled. The damages suffered by the individual Proposed Class members are small
22 compared to the expense and burden of individual prosecution of this litigation. In addition, class
23 certification is superior because it will obviate the need for unduly duplicative litigation that
24 might result in inconsistent judgments about Defendants' practices.

25 26. Plaintiffs intend to send notice to all members of the Proposed Class to the extent
26 required by Rule 23. Upon information and belief, the names and address of the Proposed Class
27 are available from Defendants.
28

FIRST CLAIM FOR RELIEF

(Failure to Pay Overtime Compensation in Violation of the Fair Labor Standards Act)

27. Plaintiffs allege and incorporate by reference the allegations in the preceding paragraphs.

28. Plaintiff Mead consents in writing to be a part of this action, pursuant to 29 U.S.C. § 216(b). Such written consent form is attached hereto. Plaintiff Mead anticipates that as this case proceeds, other individuals will sign consent forms and join as plaintiffs.

29. At all relevant times, Defendants have been, and continue to be, an “employer” engaged in interstate commerce and/or in the production of goods for commerce, within the meaning of the FLSA, 20 U.S.C. § 203. At all relevant times, Defendants have employed and continue to employ employees, like Plaintiff Mead and the Collective Class.

30. The FLSA requires each covered employer such as Defendants to compensate all non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty hours per work week.

31. During their employment with Defendants, within the applicable statute of limitations, Plaintiffs worked in excess of forty hours per workweek without overtime compensation. Despite the hours worked by Plaintiffs, Defendants willfully, in bad faith, and in knowing violation of the Federal Fair Labor Standards Act, failed and refused to pay them overtime compensation.

32. By failing to accurately record, report, and/or preserve records of hours worked by Plaintiffs, Defendants have failed to make, keep, and preserve records with respect to each of its employees sufficient to determine their wages, hours, and other conditions and practice of employment, in violation of the FLSA, 29 U.S.C. § 201, *et seq.*

33. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA, within the meaning of 29 U.S.C. § 255(a).

34. Plaintiffs seek damages in the amount of their respective unpaid overtime compensation, liquidated damages from three years immediately preceding the filing of this

1 action, plus interests and costs as allowed by law, pursuant to 29 U.S.C. §§ 216(b) and 255(a),
 2 and such other legal and equitable relief as the Court deems just and proper.

3 35. Plaintiffs seek recovery of their attorneys' fees and costs to be paid by Defendants,
 4 as provided by the FLSA, 29 U.S.C. § 216(b).

5 **SECOND CLAIM FOR RELIEF**

6 **(Failure to Pay Overtime Compensation in Violation of California Law)**

7 36. Plaintiffs allege and incorporate by reference the allegations in the preceding
 8 paragraphs.

9 37. At all relevant times herein, IWC Wage Order No. 4 (8 C.C.R. § 11040) and
 10 California Labor Code § 510 required employers, such as Defendants, to pay overtime
 11 premium(s) for hours worked in excess of 8 in a given workday, 40 in a given workweek, or on
 12 the seventh day worked in a single workweek. Pursuant to California Labor Code § 1198, it is
 13 unlawful to employ persons for hours longer than the hours set by the Industrial Welfare
 14 Commission ("IWC"), or under conditions prohibited by the applicable wage orders of the IWC.

15 38. Plaintiff Mead is informed and believes, and thereon alleges, that members of the
 16 Class worked in excess of eight hours per day and in excess of 40 hours per week, and
 17 Defendants unlawfully failed to pay members of the Class the overtime required in violation of
 18 IWC Wage Order 4 (8 C.C.R. § 11040), and the California Labor Code §§ 510 and 1198.
 19 Pursuant to California Labor Code § 1194, Plaintiff Mead and the other Class Members are
 20 entitled to recover their unpaid overtime compensation.

21 39. As a direct and proximate result of Defendants' unlawful conduct, as set forth
 22 herein, Plaintiff Mead and the Class have sustained damages, including loss of earnings for hours
 23 of overtime worked on behalf of Defendants in an amount to be established at trial, plus interest,
 24 attorneys' fees and costs.

25 **THIRD CLAIM FOR RELIEF**

26 **(Waiting Time Penalties)**

27 40. Plaintiffs allege and incorporate by reference the allegations in the preceding
 28 paragraphs.

1 41. During the relevant time period, many Class members were employed by and
2 thereafter terminated by or resigned from their positions with Defendants. Defendants, however,
3 willfully failed to pay such Class Members all wages owed them (including overtime wages)
4 within the time limits set forth in California Labor Code sections 201 and 202.

5 42. Under Labor Code sections 201, 202, and 203, those Class Members who no
6 longer work for Defendants are entitled to waiting time penalties for Defendants' willful failure to
7 timely pay all wages owed upon separation of their employment.

8 **FOURTH CLAIM FOR RELIEF**

9 **(Failure to Provide Accurate Itemized Wage Statements)**

10 43. Plaintiffs allege and incorporate by reference the allegations in the preceding
11 paragraphs.

12 44. California Labor Code § 226(a) provides that, at the time of each payment of
13 wages, an employer shall provide each employee with a wage statement itemizing, among other
14 things, the total hours worked by the employee in the pay period. California Labor Code § 226(e)
15 provides that an employee suffering injury as a result of a knowing and intentional failure by an
16 employer to comply with Labor Code § 226(a) may recover the greater of his or her actual
17 damages or a penalty of \$50 for the initial pay period in which a violation occurs and \$100 per
18 employee for each violation in a subsequent pay period (up to a maximum of \$4,000), in addition
19 to attorneys' fees and costs.

20 45. Defendants knowingly and intentionally failed to provide timely, accurate,
21 itemized wage statements including, *inter alia*, hours worked, to Plaintiff Mead and the Class in
22 accordance with Labor Code § 226(a). Such failure caused injury to Plaintiff Mead and the Class
23 members, by, among other things, impeding them from knowing the total hours worked and the
24 amount of wages to which they are and were entitled. Plaintiff Mead and the Class are therefore
25 entitled to the damages and penalties provided for under Labor Code § 226(e). Pursuant to Labor
26 Code section 226(g), Plaintiff Mead and the Class are also entitled to and seek injunctive relief
27 requiring Defendants to comply with Labor Code 226(a).
28

FIFTH CLAIM FOR RELIEF

(Unfair Practice under the Unfair Competition Act)

46. Plaintiff alleges and incorporates by reference the allegations in the preceding paragraphs.

47. Section 17200 of the California Business and Professions Code — California's Unfair Competition Law — prohibits unfair competition by prohibiting, *inter alia*, any unlawful or unfair business acts or practices. The foregoing conduct by Defendants, as alleged, constitutes unlawful business actions and practices in violation of Section 17200, *et seq.*

48. Members are entitled to restitution of the overtime earnings and other unpaid wages and premiums alleged herein that Defendants have improperly withheld and retained during a period that commences four years prior to the filing of this action, a permanent injunction requiring Defendants to pay overtime to all workers as defined herein, in California, an award of attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and other applicable law, and costs.

PRAYER FOR RELIEF

49. WHEREFORE, Plaintiffs pray for relief as follows:

- A. Designation of this action as a collective action on behalf of the nationwide Collective Class and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the nationwide Collective Class apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual consent forms pursuant to 29 U.S.C. § 216(b);
- B. Judgment against Defendants for an amount equal to Plaintiff Mead and the Collective Class's unpaid back wages at the applicable overtime rate;
- C. That Defendants are found to have violated the FLSA by failing to maintain accurate time records of all the hours worked by Plaintiffs;
- D. That Defendants' violations of the FLSA are found to be willful;
- E. An equal amount to the overtime damages as liquidated damages;

- 1 F. An award of reasonable attorneys' fees and costs pursuant to 29 U.S.C.
2 section 216 and/or other applicable state laws;
- 3 G. An award of prejudgment interest;
- 4 H. Leave to add additional plaintiffs by motion, the filing of written consent
5 forms, or any other method approved by the Court;
- 6 I. Leave to amend additional state law claims by motion;
- 7 J. That the Court determine that this action may proceed as a class action
8 under Rule 23(b)(1) and (3) of the Federal Rules of Civil Procedure;
- 9 K. That Defendants are found to have violated the overtime, itemized wage
10 statement/time records, and waiting time penalty provisions of the state
11 wage laws cited above as to the California Class identified above;
- 12 L. That Defendants be ordered and enjoined to pay restitution to Plaintiff
13 Mead and the Proposed Class due to Defendants' unlawful activities,
14 pursuant to state laws cited above;
- 15 M. That Defendants further are enjoined to cease and desist from unlawful
16 activities in violation of state laws cited above; and
- 17 N. For such other and further relief, in law or equity, as this Court may deem
18 appropriate and just.

19 **JURY DEMAND**

20 50. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs,
21 individually and on behalf of all others similarly situated, demand a trial by jury.
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1 Dated: October __, 2007

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